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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 123

VIRGINIA WILLYS LUCOM and WILSON C. LUCOM,
*Petitioners,*

v.

ATLANTIC NATIONAL BANK OF WEST PALM BEACH, FLORIDA, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR REHEARING

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Petitioners respectfully pray that this Court grant rehearing of its Order of October 17, 1966, denying the Petition for Certiorari, that a writ of certiorari thereupon issue, and that the case be remanded to the Court of Appeals for consideration of the matters specified herein.

This Petition for Rehearing, filed pursuant to Rule 58(2) of this Court, is premised in the words of that Rule upon "other substantial grounds available to petitioner although not previously presented." See *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50; *Massey* v. *United States*, 291 U.S. 608; *Union Trust Co.* v. *Eastern Air Lines, Inc.*, 350 U.S. 962; *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U.S. 183, and cases cited therein.

The primary basis of the opinion below, which evolved into the question presented to this Court in the Petition for Certiorari, was the ruling that Florida limitations law barred this action by a former ward and her husband against a guardian who had been finally discharged. The Petition asserted that this ruling was contrary to Florida decisions and principles announced by this Court and was so violative of the obligation of federal courts to follow applicable state law as to warrant the grant of certiorari.

Not contained in the Petition but presented to and avoided by the Court of Appeals, however, was an even more fundamental question going to the very efficacy of that court's ruling as to the applicability of Florida limitations law. That ruling, which affirmed the summary judgment entered by the District Court, found that there were no genuine issues of material facts relative to the limitation matters. That finding of fact was misfounded. Indeed, not only does the record demonstrate innumerable disputes of material facts but the major contention advanced by the petitioners to the Court of Appeals was that the existence of these disputed matters made the entry of summary judgment improper and deprived petitioners of their right to a jury trial of such disputed matters, in ac-

cordance with the Seventh Amendment. Yet the Court of Appeals did not decide that issue. It ignored that jury-trial contention and proceeded to rule that the suit was barred by limitations on the basis of the disputed version of the facts advanced by the respondent. That these facts were in dispute is obvious from a most cursory examination of the record:

1. There was a serious dispute as to when the decisive accounting and discharge of the guardian took place, the determination of which was crucial to the commencement of the limitations periods. The courts below summarily ruled that such accounting and discharge occurred on March 25, 1955, whereas the record shows and petitioners contend that that accounting as shown by its terms was only a periodic accounting and that the *final* accounting and discharge did not take place until 1961, after the Florida Supreme Court had reversed and substantially modified the 1955 accounting. While the Court of Appeals recognized that the final discharge occurred in 1961, it still relied upon the 1955 conditional order for purposes of the running of the limitations periods. Thereby the petitioners were deprived of their right to a jury determination as to the disputed nature and effect of the 1955 order and as to the beginning date of limitations.

2. The Court of Appeals made its own finding that the *fact of fraud* was known to petitioners as far back as 1955, thereby causing the fraud limitations period to run from that date. But petitioners vigorously denied that they were aware of the fraud as of that date. And they were at no time allowed to present proof before a jury in order to obtain a resolution of this highly disputed subjective factor concerning petitioners' knowledge and awareness.

3. The assertion of the Court of Appeals (Pet. App. 7a) that "virtually all the facts relied upon here as constituting the fraud were asserted in that [collateral] proceeding" in the Florida courts involving the guardian's accounts overlooks the assertion and the fact that such matters were not presented to the Florida courts in those collateral proceedings. No allegations of fraud were presented to the state courts and the Florida Supreme Court opinion reveals no existence of such issues. See Pet. App. 25a. Thus a material fact question concerning the prior proceedings was resolved against petitioners without affording them any opportunity to be heard before a jury respecting their version of the facts and the proceedings. Cf. *Free* v. *Bland,* 369 U.S. 663, 671 ("no issue of fraud was or could properly have been decided by the court below on summary judgment").

4. In addition, there was a disputed factual issue as to whether the respondent concealed evidence from the petitioners, evidence which would have proved a cause of action for conspiracy and which would have shown a plan to annul petitioners' marriage, return the wife to a mental hospital, and gain control of her property. In the record before the court below is a sworn denial by one of respondent's officers that the respondent had any knowledge of a plan to return the wife to the hospital or to undertake proceedings against the husband. At R. III 511 is contained that officer's statement that he

> ". . . was never present at any conference . . . during which alleged discussions were supposed to have been had concerning taking her back to the Philadelphia hospital and undertaking proceedings against Wilson C. Lucom for his having

> taken her from Florida while she was under the jurisdiction of the Probate Court."

This was affirmed by the officer to be "the whole truth." He reiterated that no one had ever "asked if we [the bank] would join them in such proceeding . . . at the time it was supposed to have been discussed, I knew nothing about it at all." *Ibid.* Yet newly-discovered evidence submitted by petitioners in 1964 showed that in the files of the respondent bank at the time in question there was a petition for adjudication of incompetency prepared by the bank's attorneys while the bank was already guardian of the person. R. II 19ff., 112 ff., 133. Also in those files was a 1954 notation to this effect (R. III 517-518):

> "We were informed that Mrs. de Landa [the petitioner wife] had suddenly married Charles Lucom of Washington, whom she had known only a matter of days. We were, also, informed that John de Aguirre [her son] had arrived from Tampa, and that a hearing was scheduled to be had at 3:00 P.M. Tuesday, June 1, during which it was expected that Dr. Ombres would testify as to Mrs. de Landa's present condition and request that his petition to have her restored be withdrawn. *It is our further understanding that following this procedure John de Aguirre will apply to the Court for letters of guardianship* of the person of Mrs. de Landa and *take such steps as may be necessary to have the marriage annulled.*" [Italics supplied].

Had this evidence been considered by a jury, it might well have found that the respondent had concealed significant evidence of fraud so as to toll the start of any limitations period until petitioners did in fact discover this evidence. Yet the summary ruling be-

low, which refused to reopen the summary judgment to permit consideration of this new evidence, precluded that jury determination.

The right to a jury trial in federal courts in diversity actions where there are disputed issues of fact stems directly from the Seventh Amendment. And as stated in *Simler* v. *Conner,* 372 U.S. 221, 223, this "federal policy favoring jury trials is of historic and continuing strength." It is the jury, not the court, which is the fact-finding body in the federal courts. See *Wilkerson* v. *McCarthy,* 336 U.S. 53, 63-64. Where there are issues of fact that can only be resolved by a jury, it is error to award summary judgment and thereby deprive the losing party of "the jury trial guaranteed him by the Seventh Amendemnt." *Simler* v. *Conner, supra,* 223. That is the important principle at stake here, the principle that justifies the grant of rehearing and the remand of the case to the Court of Appeals.

## CONCLUSION

For these reasons, the Order of October 17, 1966, denying certiorari, should be vacated and the matter remanded to the Court of Appeals for consideration and resolution of the questions presented herein.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

We hereby certify that this Petition for Rehearing is filed in good faith and not for delay and that the Petition is restricted to the grounds set forth in Rule 58 of this Court.

CHARLES M. TRAMMELL
EUGENE GRESSMAN

November 10, 1966.